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9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**
11

12 HCC LIFE INSURANCE COMPANY,
an Indiana corporation,

13 Plaintiff,

14 v.

15 KEVIN CONROY, LINDA CONROY,
16 Defendants.
17

Case No. 3:15-CV-02897 BEN BLM

**APPLICATION FOR
RECONSIDERATION OF RULING
ON HCC LIFE INSURANCE
COMPANY'S MOTION FOR
SUMMARY JUDGMENT**

**Fed. R. Civ. Proc. 60(b)
CivLR 7.1(i)**

18 KEVIN CONROY, LINDA CONROY

19 Counter-Claimants,

20 v.

21 HCC LIFE INSURANCE COMPANY,
22 Counter-Defendant.
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1 **I. Introduction**

2 Newly discovered evidence shows that defendants Linda and Kevin Conroy
3 (“defendants”) knew that Kevin Conroy was diagnosed and treated for alcohol
4 abuse, and was also diagnosed and treated for degenerative disc disease and
5 herniation (“DJD”), and for that reason summary judgment in HCC Life’s favor
6 should be granted. Defendants incorrectly asserted that Kevin Conroy had not been
7 so diagnosed or treated when they applied for the policy. HCC Life need only show
8 misrepresentation as to either alcohol abuse or DJD in order to rescind. Documents
9 belatedly produced in this action, and deposition testimony, show that defendants’
10 declarations are insufficient to create a genuine issue of material fact and HCC Life
11 Insurance Company (“HCC Life”) is entitled to judgment in its favor. At a
12 minimum, this newly-produced evidence demonstrates that HCC Life did not act in
13 bad faith in denying coverage for Mr. Conroy’s claim.

14 Mr. Conroy’s uncorroborated declaration is contradicted by his medical
15 records and the testimony of his treating physician, and is therefore insufficient to
16 create a triable issue of material fact. Recently produced documents include a letter
17 Mr. Conroy sent to his medical providers expressly instructing them to conceal
18 references to alcohol in his medical records. In accordance with his instructions,
19 those providers produced documents that were indeed “blacked out.” Mr. Conroy
20 committed fraud when he tried to conceal his private health information and medical
21 history from his insurer. The documents also show that Mr. Conroy had repeatedly
22 been diagnosed with and treated for alcohol abuse using a harm-reduction approach
23 for more than twenty years before applying for insurance with HCC Life. Mr.
24 Conroy’s doctor, Dr. Green, testified based in part on these newly-produced
25 documents that he repeatedly told Mr. Conroy that his drinking was excessive, and
26 that he needed to cut back. Dr. Green testified that telling a patient to cut back is a
27 form of treatment. It is undisputed that Mr. Conroy responded to Dr. Green’s
28 instructions by making repeated efforts to cut back. HCC Life’s expert, Dr. Zucker,

1 testified that Mr. Conroy was aware that he had a diagnosis of alcoholism and that
2 he received treatment for it.

3 Mr. Conroy's declaration concerning his DJD is also uncorroborated and is
4 therefore insufficient to create a triable issue of material fact. Documents produced
5 on March 6, 2017 do not corroborate Mr. Conroy's declaration, but instead show
6 that Mr. Conroy knew about his diagnosis and treatment for DJD. A letter from Mr.
7 Conroy's employer indicates that the employer discussed Dr. Murphy's QME report
8 with Mr. Conroy. That report described and addressed Mr. Conroy's DJD, and Mr.
9 Conroy admitted in his deposition that he received at least two of these reports.
10 Newly-obtained records and deposition testimony based on those records
11 demonstrate that Mr. Conroy knew he had experienced symptoms of DJD, was
12 diagnosed with DJD, and received physical therapy to treat this disorder before he
13 applied for insurance with HCC Life. HCC Life's expert testified that, given the
14 applicable standard of care and the many doctors' visits addressing this condition,
15 Mr. Conroy knew that he suffered from DJD.

16 HCC Life therefore seeks reconsideration of the Court's March 22, 2017
17 order denying HCC Life's motion for summary judgment on the basis of newly-
18 discovered evidence that supports the motion. HCC Life also seeks a finding that it
19 did not breach the covenant of good faith. At a minimum it made a reasonable
20 decision to deny coverage.

21 **II. Factual Background**

22 **A. On August 26, 2016, HCC Life Moved for Summary Judgment**

23 On August 26, 2016, HCC Life moved for summary judgment because
24 defendants intentionally misrepresented material facts in their insurance application.
25 (Memorandum of Points and Authorities in Support of HCC Life's Motion for
26 Summary Judgment ("HCC Life's MSJ"), Docket No. 30-1.) In response to
27 questions in the policy application and verification call, defendants represented that
28 they had not "within the last five years... been diagnosed, treated or taken

1 medication for ... degenerative disc disease or herniation bulge... [or] alcohol
2 abuse.” (HCC Life’s MSJ at pp. 1–3.)

3 In its motion, HCC Life introduced evidence that defendants’ representation
4 was false. HCC Life’s evidence showed that Mr. Conroy had been diagnosed and
5 treated for alcohol abuse in the few years preceding his application for insurance
6 with HCC Life. The evidence included hospitalization records reflecting Mr.
7 Conroy’s history of chronic alcohol abuse, and Mrs. Conroy’s statement to a social
8 worker at the hospital that Mr. Conroy drank 12-14 beers per day over the last 40
9 years, and that it was “a family concern that [Mr. Conroy] be sober for the benefit of
10 his family members (in addition to his own health.)” HCC Life also introduced Mr.
11 Conroy’s medical records that showed Mr. Conroy was repeatedly diagnosed with
12 alcohol abuse before applying for the HCC Life policy certificate. (HCC Life’s
13 MSJ at pp. 4–6.)

14 HCC Life also introduced evidence that Mr. Conroy had been diagnosed and
15 treated for DJD. The evidence included workers’ compensation reports completed
16 by Dr. Paul Murphy that described Mr. Conroy’s DJD at multiple levels of the
17 cervical spine. (HCC Life’s MSJ at pp. 6–7.)

18 **B. Defendants Submit Mr. Conroy’s Declaration In Opposition to the**
19 **Motion for Summary Judgment**

20 In his declaration in opposition to HCC Life’s motion for summary judgment,
21 which contained several self-serving statements, Mr. Conroy stated:

22 11. To the best of my recollection and knowledge, from 2009 to
23 2014, I was not diagnosed, treated or taken medication for any of the
24 following: heart disease including heart attack, chest pain or had heart
25 surgery, degenerative disc disease or herniation/bulge, or alcohol abuse.

26 12. Prior to the application for insurance with HCC Life Insurance
27 Company, I do not recall any discussions with any medical providers
28 wherein I was informed that I had been diagnosed with alcohol abuse.
I recall a couple of conversations with my primary care physician
where in [sic] advised me to “cut back” on my alcohol consumption. I
was never informed by any medical provider, or anyone else, that I
needed alcohol treatment. No one has ever referred me to any alcohol
abuse treatment or counseling, nor have I ever been prescribed any

1 medications for alcohol abuse.¹

2 13. Prior to the application for insurance with HCC Life Insurance
3 Company, I do not recall any discussions with any medical providers
4 wherein I was informed that I had been diagnosed with degenerative
5 disc disease or herniation/bulge. Relating to the neck pain associated
6 with my shoulder injury, I understood that the treatment I received for
my shoulder and related neck pain was to treat the torn rotator cuff and
cervical strain or sprain, not to treat any degenerative disc disease or
herniation/bulge. To the best of my knowledge, I have never been
prescribed medication for degenerative disc disease or herniation/bulge.

7 (Docket No. 45-3 at pp. 2–3.) Newly-discovered evidence demonstrates that Mr.
8 Conroy’s uncorroborated declaration is a misrepresentation to the Court. That
9 evidence, including Mr. Conroy’s own deposition testimony, demonstrates Mr.
10 Conroy’s alcohol abuse was diagnosed repeatedly over the course of a 20-year
11 period. Mr. Conroy’s declaration is internally inconsistent because being told to
12 “cut back” is treatment for alcohol abuse. Because Mr. Conroy’s declaration is not
13 only uncorroborated and internally inconsistent, but also directly at odds with
14 documents defendants withheld until March 6, 2017, HCC Life’s motion for
15 summary judgment should be granted.

16 **C. In Early March, HCC Life Obtained New Evidence that Supports**
17 **its Summary Judgment Motion**

18 After filing its motion for summary judgment, between March 6, 2017 and
19 March 15, 2017, HCC Life obtained evidence that supports the motion that it could
20 not have obtained earlier.

21 On August 10, 2016, HCC Life served defendants with requests for
22 production of documents. Request number 6 asked defendants to produce all
23 documents in defendants’ possession, custody, or control relating to “medical
24 services, including diagnosis OR treatment for any medical condition, provided to
25 Defendant and Counter-Claimant Kevin Conroy from July 25, 2009 to July 25,

26 _____
27 ¹ The application asks whether a proposed insured had been “treated” for alcohol
28 abuse, and does not require that the treatment be by a psychologist.

2014.” Request number 7 asked defendants to produce all documents in defendants’ possession, custody, or control relating to any “claim for workers’ compensation benefits made by Defendant and Counter-Claimant Kevin Conroy from July 25, 2009 to July 25, 2014, including but not limited to deposition transcripts, medical records, and expert reports.”

On March 6, 2017, almost 7 months later, defendants belatedly produced 572 pages of documents. The documents include medical records and correspondence that directly support HCC Life’s motion for summary judgment.

Between March 7, 2017 and March 15, 2017, defendants and HCC Life took the deposition of six witnesses whose testimony further supports HCC Life’s motion for summary judgment. That testimony was based in part on the documents defendants belatedly produced on March 6, 2017. The testimony could not have been elicited before HCC Life filed its motion for summary judgment because it was based on documents defendants withheld.

D. On March 22, 2017, the Court Denied HCC Life’s Motion for Summary Judgment

This Court denied HCC Life’s motion for summary judgment on March 22, 2017 only on the ground that a genuine issue of material fact existed as to whether defendants “knew Mr. Conroy suffered from alcohol abuse, degenerative disc disease, or herniation/bulge at the time Mrs. Conroy applied for insurance.” (Docket No. 65 at p.10.) In finding a triable issue of fact with respect to Mr. Conroy’s alcohol abuse, the Court noted that defendants in their declarations said they were never informed of an alcohol abuse diagnosis, and Mr. Conroy never received treatment for alcohol abuse. The Court also found “no evidence that Dr. Green shared his assessment that Mr. Conroy suffered from ‘alcohol abuse (305.00).’” (Docket No. 65 at pp. 11–12.) In finding a triable issue of fact as to Mr. Conroy’s DJD, the Court noted that defendants’ declarations said that, to the best of their knowledge, Mr. Conroy had not been diagnosed, treated, taken medication for,

1 or exhibited signs or symptoms of DJD. (Docket No. 65 at pp. 10–11.) The Court
 2 also found genuine issues as to whether Mr. Conroy knew he suffered from DJD.
 3 (Docket No. 65 at p. 11.)

4 **E. Newly-Discovered Evidence Shows Mr. Conroy’s Knew of his**
 5 **Alcohol Abuse Diagnosis and Treatment**

6 Newly-discovered evidence shows that Mr. Conroy knew he had been
 7 diagnosed and treated for alcohol abuse, and intentionally misrepresented to HCC
 8 Life and to the Court that he had not been so diagnosed and treated. This evidence
 9 demonstrates that HCC Life is entitled to rescission as a matter of law.

10 **1. Mr. Conroy asked Sharp to Redact Records Showing Alcohol**
 11 **Abuse**

12 Newly-discovered evidence demonstrates that Mr. Conroy not only knew
 13 about his alcohol abuse, but requested that his medical providers conceal that abuse
 14 from his employer.

15 On March 6, 2017, defendants produced a July 27, 2012 letter from Mr.
 16 Conroy to Sharp Rees-Steely Medical Group. In the letter Mr. Conroy instructs
 17 Sharp that “[a]ny records mentioning alcohol and mental stress must be black [sic]
 18 out if the employer request [sic] my records.” (Declaration of Dennis G. Rolstad in
 19 Support of Motion for Reconsideration (“Rolstad Decl.”) at ¶ 5, Ex. A, CONROY
 20 001222.) This letter demonstrates that Mr. Conroy knew he suffered from alcohol
 21 abuse and undertook efforts to conceal it. Produced documents, received on about
 22 September 7, 2016, have indeed been “blackened out,” apparently in response to Mr.
 23 Conroy’s request, to hide evidence of his alcohol abuse. HCC Life was not
 24 provided this letter, and therefore did not know the Sharp documents were blacked
 25 out at Mr. Conroy’s instruction, until long after the motion for summary judgment
 26 was filed and briefing closed, despite having issued a subpoena to Sharp and serving
 27 requests for production seven months earlier. Mr. Conroy committed fraud when he
 28 misrepresented his health history on his insurance application and then instructed his

doctors to conceal his alcohol abuse and mental health history.

2. Sharp Redacted Records Showing Mr. Conroy's Alcohol Abuse Diagnosis in Response to His Request

In accordance with Mr. Conroy's instruction, Sharp redacted Mr. Conroy's medical records to conceal his alcohol abuse and mental stress. (Rolstad Decl. at ¶ 6, Ex. B (CONROY 000916, 000951, 000953, 000980; [no prefix] 000006, 000008, 000010.))

On April 7, 2017 at about 2:30 p.m. – the date HCC Life filed this application for reconsideration – defendants produced unredacted copies of some of these documents, far too late for HCC Life to submit them in support of its motion for summary judgment. The unredacted documents show that Mr. Conroy had been repeatedly diagnosed with alcohol abuse, and that the diagnosis had been redacted. HCC Life had repeatedly requested that Mr. Conroy execute an authorization for the release of unredacted records, but despite repeated requests, he refused to do so. (Rolstad Decl., ¶ 7, Ex. B-1.)

The decision to withhold these documents, many until the eve of trial is an evasion of pretrial discovery and is sanctionable conduct. Fed. R. Civ. P. 37; *Wanderer v. Johnston*, 910 F.2d 652, 655 (9th Cir. 1990) (defendants' failure to produce documents and appear for deposition "constitute a clear interference with the plaintiffs' ability to prove the claims and obtain a decision in the case" making prejudice palpable and a default sanction appropriate.)

3. Medical Records Show Harm Reduction Treatment Going Back to 1992

Medical records produced for the first time on March 6, 2017 demonstrate a very long history of alcohol abuse that make it incomprehensible that Mr. Conroy did not know about his diagnosis. The newly-produced records include reference to a "long talk" Dr. Green had with Mr. Conroy about his alcohol abuse, contradicting the Court's finding of no evidence that Dr. Green conveyed his diagnosis to Mr.

1 Conroy. The records show that Mr. Conroy's doctors repeatedly told him to cut
 2 down on his drinking beginning in 1992 and continuing through Mr. Conroy's
 3 hospitalization. The records also show that Mr. Conroy's alcohol abuse caused
 4 hyperlipidemia, ecchymosis, elevated erythrocyte macrocytic volume ("MCV"), and
 5 abnormal liver function test ("LFT") results. These records include:

- 6 • An undated history and physical exam form that says Mr. Conroy was
 7 told to reduce his alcohol intake ("Etoh... try to ↓") and that health
 8 education issues discussed included "etoh" (Rolstad Decl., ¶8, Ex. C at
 9 CONROY 001021);
- 10 • A March 28, 1995 progress note reflecting a dietician's
 11 recommendation that Mr. Conroy reduce his alcohol intake ("3) ↓etoh")
 12 because Mr. Conroy "consumes – 600 kcal from etoh daily" (Rolstad
 13 Decl., ¶8, Ex. C at CONROY 001011);
- 14 • A January 1997 "Allergic/Adverse Reaction" chart showing a January
 15 1997 diagnosis of "alcohol use" and an elevated LFT and MCV
 16 secondary to alcohol ("etoh") (Rolstad Decl., ¶8, Ex. C at CONROY
 17 001126);
- 18 • A January 31, 1997 progress record reflecting that Dr. Green had a
 19 "long talk" with Mr. Conroy concerning his alcohol abuse ("ETOH!!")
 20 because Mr. Conroy's test results showed "alcohol related" elevated
 21 LFT and MCV (Rolstad Decl., ¶8, Ex. C at CONROY 001009);
- 22 • A March 28, 2005 Educational Program Referral Form states that Mr.
 23 Conroy was referred to a health education program for hyperlipidemia,
 24 a symptom of chronic alcohol abuse (Rolstad Decl., ¶8, Ex. C at
 25 CONROY 001213; ¶10);
- 26 • April 18, 2007 lab results including Dr. Green's note: "LFTs and trig
 27 up. Etoh. Please ask patient to work on decreasing alcohol. We
 28 should re check hepatic panel, and triglycerides in three months"

(Rolstad Decl., ¶8, Ex. C at CONROY 001075);

- An April 23, 2007 phone message record that indicates Dr. Green instructed his assistant to “please ask patient to work on decreasing alcohol,” and that his assistant Denise Gomes called Mr. Conroy and told him to cut back (“PT WAS ALSO ADVISED TO DECREASE ALCOHOL. PT AGREED”) (Rolstad Decl., ¶8, Ex. C at CONROY 001127);
- A May 17, 2013 list of active problems including a “history of elevated ALT thought to be from alcohol,” as well as ecchymosis and hyperlipidemia which are both associated with alcohol abuse (Rolstad Decl., ¶8, Ex. C at CONROY 000979); and
- A May 17, 2013 visit summary reflecting Mr. Conroy’s hyperlipidemia, raised ALT level, and ecchymosis (Rolstad Decl., ¶8, Ex. C at CONROY 000962-963).

The records demonstrate that Mr. Conroy intentionally misrepresented his responses to HCC Life’s application for insurance and HCC Life is entitled to rescission as a matter of law.

4. Deposition Testimony Based On These Records Show Mr. Conroy Knew About his Alcohol Abuse Diagnosis and Treatment

Shortly after receiving these newly-produced documents, HCC Life took the deposition of several witnesses who testified, based in part on these documents, that Mr. Conroy knew he had been diagnosed with and treated for alcohol abuse.

(a) Testimony by Dr. Green

Mr. Conroy’s primary care physician, Dr. Green, not only testified that he diagnosed Mr. Conroy with alcohol abuse, but also testified that he repeatedly told Mr. Conroy to cut down on his drinking.

Dr. Green testified that on June 15, 2012, Mr. Conroy told him that he drank

1 12-15 beers per day, he had done so for many years, and he knew he should cut
 2 down. (Rolstad Decl., ¶ 9, Ex. D at 8:21–23; 9:19–10:17.) Dr. Green testified that
 3 telling a patient to cut back is treatment for alcohol abuse. (Rolstad Decl., ¶ 9, Ex.
 4 D at 10:18–21.) Dr. Green testified that he had a 25-minute conversation with Mr.
 5 Conroy with more than half of that time spent talking about Mr. Conroy’s alcohol
 6 use and stress in his work situation. (Rolstad Decl., ¶ 9, Ex. D at 13:8–14.) Dr.
 7 Green testified that he “would have told him that he thought the amount of alcohol
 8 that he was drinking was excessive and that he needed to cut back.” (Rolstad Decl.,
 9 ¶ 9, Ex. D at 14:1–11.)

10 Dr. Green testified that on August 8, 2012 he diagnosed Mr. Conroy with
 11 alcohol abuse, and it was his custom and practice to discuss his alcohol abuse
 12 assessment with Mr. Conroy. (Rolstad Decl., ¶ 9, Ex. D at 16:15–17:7.) Dr. Green
 13 testified that on May 17, 2013 Mr. Conroy told him that he had cut his alcohol down
 14 to about two beers per day. (Rolstad Decl., ¶ 9, Ex. D at 17:11–19.)

15 Dr. Green testified that on another appointment he discussed health education
 16 issues, including alcohol. (Rolstad Decl., ¶ 9, Ex. D at 21:21–23:1) Dr. Green
 17 testified that he referred Mr. Conroy to a dietician, and that the dietician discussed
 18 decreasing Mr. Conroy’s alcohol use. (Rolstad Decl., ¶ 9, Ex. D at 23:24–25:8.)

19 Dr. Green had another “long talk” with Mr. Conroy on January 31, 1997 in
 20 which he discussed the amount of his drinking. (Rolstad Decl., ¶ 9, Ex. D at 27:21–
 21 25; 29:8–18.) Dr. Green had this “long talk” because he found several different
 22 physical signs of Mr. Conroy’s alcohol abuse, and told Mr. Conroy that these
 23 physical signs were due to his alcohol abuse. (Rolstad Decl., ¶ 9, Ex. D at 29:19–
 24 30:11.)

25 Dr. Green testified that he instructed his medical assistant on about April 18,
 26 2007 to tell Mr. Conroy to “work on decreasing alcohol,” and that the medical
 27 records indicate that the assistant performed this task. (Rolstad Decl., ¶ 8, Ex. C at
 28 CONROY 001127 and ¶ 9, Ex. D at 33:15–35:19) Dr. Green testified that Mr.

1 Conroy knew the plan was to decrease alcohol and get follow-up testing. (Rolstad
2 Decl., ¶ 9, Ex. D at 37:4–9.)

3 **(b) Dr. Zucker's Testimony**

4 HCC Life's expert, Dr. Zucker, testified that after reviewing Mr. Conroy's
5 medical records, he concluded that those records clearly show that Mr. Conroy was
6 aware that he had a diagnosis of alcoholism; had received
7 recommendations for treatment as well as a form of treatment; was
8 suffering from the consequences of his alcoholism; and, therefore, the
statement on the application that he had never been told of this
diagnosis, treatment or received any medications for it was incorrect.

9 (Rolstad Decl., ¶ 10, Ex. E at 29:14–22.)

10 Dr. Zucker based his opinion that Mr. Conroy knew he had been diagnosed
11 with alcohol abuse on the many medical records showing that Mr. Conroy was
12 counseled concerning his alcohol abuse, showed physical signs of alcohol abuse,
13 and was cautioned to cut back. (Rolstad Decl., ¶ 10, Ex. E at 33:9–34:3.) Dr.
14 Zucker testified that the medical records show that Mr. Conroy was well aware that
15 he had been informed of an alcohol problem, recommended treatment, explained the
16 consequences of his severe and life-threatening problem. (Rolstad Decl., ¶ 10, Ex. E
17 at 50:1–20.) Dr. Zucker testified that Mr. Conroy qualified for the diagnosis of
18 substance use disorder, alcohol use disorder (severe), and substance abuse disorder,
19 as well as dependence. (Rolstad Decl., ¶ 10, Ex. E at 36:15-19.) Dr. Zucker
20 testified that these diagnoses were supported by the extent of Mr. Conroy's alcohol
21 intake ("over 40 years of an extraordinary amount of alcohol reported in many of the
22 documents as 12 to 15 beers a day") and the consequences of his drinking
23 (physicians informed Mr. Conroy that his health problems such as hypertension,
24 hyper lipidemia, altered liver function, and malnutrition) were related to his
25 alcoholism. (Rolstad Decl. at ¶ 10, Ex. E at 36:21–37:10, 44:8–20.) Dr. Zucker
26 also testified that Mr. Conroy's function was harmed due to his alcohol abuse in that
27 his family was hesitant to leave their child in his presence because of alcohol.
28 (Rolstad Decl., ¶ 10, Ex. E at 37:17–37:22, 44:20–45:8)

1 Dr. Zucker testified that Mr. Conroy was recommended to cut back on his
 2 alcohol consumption, and the records show that he may have tried, but ultimately he
 3 was not able to, resulting in DTs (delirium tremens) “which is a life-threatening
 4 form of withdrawal from alcohol.” The DTs evidenced Mr. Conroy’s alcohol
 5 dependence. (Rolstad Decl., ¶ 10, Ex. E at 37:23–38:6, 39:16–24.) Dr. Zucker also
 6 testified that many of Mr. Conroy’s medical problems were, in his opinion, due to
 7 his alcohol abuse, including his hypertension, hyperlipidemia, and elevated liver
 8 enzyme. (Rolstad Decl., ¶ 10, Ex. E at 40:1–4, 40:12–14.)

9 Dr. Zucker testified that Mr. Conroy falsified his insurance application when
 10 he claimed that nobody used the exact terms “diagnosis” or “alcohol abuse,”
 11 because “it was clear from the records that he did have prior knowledge, and to state
 12 that he didn’t was an act of falsification.” A doctor does not always say “your
 13 diagnosis is” when explaining that you have an illness. Telling a patient that he or
 14 she has an alcohol problem and needs to cut back constitutes having explained to the
 15 patient that they have an illness. (Rolstad Decl., ¶ 10, Ex. E at 41:3–20, 42:4–43:1.)

16 (c) Mr. Conroy’s Testimony

17 Mr. Conroy testified that he discussed his drinking with Dr. Green in June of
 18 2012, and told him that he drank about 4-6 beers per day. (Rolstad Decl., ¶ 11, Ex.
 19 F at 10:11–11:10.) Mr. Conroy’s alcohol consumption came up as a topic of
 20 discussion with Dr. Green during all of his appointments for more than ten years.
 21 (Rolstad Decl., ¶ 11, Ex. F at 12:13–22.) Dr. Green told Mr. Conroy that he should
 22 cut back on his alcohol consumption. (Rolstad Decl., ¶ 11, Ex. F at 13:1–5.) Mr.
 23 Conroy testified that he started drinking when he was about 20, and that the amount
 24 he drank varied. (Rolstad Decl., ¶ 11, Ex. F at 18:9–22.) Mr. Conroy testified that
 25 he told Dr. Green he had reduced the amount he was drinking, and that he had
 26 indeed cut back. (Rolstad Decl., ¶ 11, Ex. F at 19:8–23.) Mr. Conroy admitted that
 27 there were times when he would cut back on his intake of alcohol at the suggestion
 28 of Dr. Green but later he increased his intake again. (Rolstad Decl., ¶ 11, Ex. F at

1 28:12–15.)

2 **(d) Mrs. Conroy’s Testimony**

3 Mrs. Conroy initially testified that she and Mr. Conroy “drink socially,” and
 4 that, because of his shoulder, “he drank more because of the pain.” (Rolstad Decl., ¶
 5 12, Ex. G at 23:9–23; 24:9–17.) Later in the deposition, Mrs. Conroy admitted that
 6 Mr. Conroy primarily drank at home rather than socially. (Rolstad Decl., ¶ 12, Ex.
 7 G at 104:21–107:16.) Mrs. Conroy testified that, during a typical day during the
 8 four-year period when their son lived with them, Mr. Conroy would start drinking at
 9 about 4:00 in the afternoon. (Rolstad Decl., ¶ 12, Ex. G at 27:10–17.) During this
 10 period, she was aware that Mr. Conroy drank more than three beers in a single day,
 11 but when asked whether she saw him drink more than four beers, she replied “I
 12 don’t really count.” (Rolstad Decl., ¶ 12, Ex. G at 28:9–20.) Mrs. Conroy testified
 13 that Mr. Conroy stopped drinking after his hospitalization because he “doesn’t want
 14 to have another heart attack.” (Rolstad Decl., ¶ 12, Ex. G at 75:19–21.) Mrs.
 15 Conroy testified that after the hospitalization a doctor recommended that Mr.
 16 Conroy stop drinking and smoking. (Rolstad Decl., ¶ 12, Ex. G at 76:11–12; 77:6–
 17 10.)

18 **F. Newly-Discovered Evidence Shows Mr. Conroy Knew About his**
 19 **Degenerative Disc Disease Diagnosis and Treatment**

20 Newly-discovered evidence shows that Mr. Conroy knew he had been
 21 diagnosed or treated for DJD, and intentionally misrepresented that he had not been
 22 so diagnosed and treated. This evidence demonstrates that HCC Life is entitled to
 23 rescission as a matter of law.

24 **1. Mr. Conroy’s Employer Discussed Dr. Murphy’s February**
 25 **2014 Report with Mr. Conroy**

26 Newly-produced records relating to Mr. Conroy’s workers’ compensation
 27 claim demonstrate that Mr. Conroy knew the contents of Dr. Murphy’s QME report
 28 that included a DJD diagnosis.

On March 6, 2017, defendants produced a June 18, 2014 letter from Mr. Conroy's employer that says Mr. Conroy read and discussed Dr. Murphy's February 2014 report – which described Mr. Conroy's DJD – with human relations manager Rita Weinblatt. The letter says that two days earlier Ms. Weinblatt and Mr. Conroy “discussed your status and the most recent medical documentation (the February 2014 report from Dr. Murphy) indicating your permanent restrictions.” This letter demonstrates that Mr. Conroy knew he suffered from DJD. (Rolstad Decl., ¶13, Ex. H (CONROY 000489).)

2. Medical Records Show Mr. Conroy was Treated for and Diagnosed with Degenerative Disc Disease

Newly-discovered medical records demonstrate that Mr. Conroy knew he had been diagnosed with and was treated for DJD. An August 8, 2012 report concerning a view of the cervical spine showed degeneration of the C5-6 and C6-7 intervertebral disc spaces. (Rolstad Decl., ¶ 14, Ex. I at CONROY 001038.) An October 31, 2012 report prepared by Dr. Thomas W. Harris concerning his initial orthopedic consultation with Mr. Conroy states that Mr. Conroy's x-rays showed “severe degenerative changes” to the cervical spine. (Rolstad Decl., ¶ 14, Ex. I at CONROY 000818). Notes from a March 13, 2013 appointment indicate that Mr. Conroy received physical therapy for his cervical DJD. (Rolstad Decl., ¶ 14, Ex. I at CONROY 000925.) A July 6, 2012 radiographic evaluation showed degenerative changes at C4-5 and C6-7. (Rolstad Decl., ¶ 14, Ex. I at CONROY 001044).

3. Dr. Murphy Testified that Mr. Conroy was Diagnosed, Treated, and Informed of His Degenerative Disc Disease

Dr. Murphy's testimony demonstrates that Mr. Conroy knew he had experienced symptoms of DJD, was diagnosed with DJD, and received treatment in the form of physical therapy for this disorder before he applied for insurance with HCC Life. His statement that he had never been diagnosed with DJD was an intentional misrepresentation of material fact providing HCC Life with grounds to

1 rescind the policy.

2 Dr. Murphy is an orthopedic surgeon and the Qualified Medical Examiner
3 (“QME”) who prepared Mr. Conroy’s QME reports for his workers’ compensation
4 case (Rolstad Decl., ¶ 15, Ex. J at 6:21-23, 8:2–3, 10:1–3.) Dr. Murphy testified that
5 Mr. Conroy had DJD. (Rolstad Decl., ¶ 15, Ex. J at 23:5–10, 23:25–24:2; 42:10–
6 14.) A person with DJD would exhibit subjective complaints of stiffness, pain, and
7 headaches. (Rolstad Decl., ¶ 15, Ex. J at 17:19–22.) Dr. Murphy testified that,
8 based on his review of Mr. Conroy’s medical records, Mr. Conroy experienced neck
9 pain. (Rolstad Decl., ¶ 15, Ex. J at 20:18–21:7; 28:10–20; 36:12–18; 37:4–10.) Dr.
10 Murphy testified that the appropriate treatment for DJD includes physical therapy.
11 (Rolstad Decl., ¶ 15, Ex. J at 16:12–19; 46:24–47:9.) Dr. Murphy testified that Mr.
12 Conroy received physical therapy to treat his neck pain. (Rolstad Decl., ¶ 15, Ex. J
13 at 20:2–5; 29:4-9.) Dr. Murphy’s testimony demonstrates that Mr. Conroy was
14 diagnosed with DJD, experienced the subjective symptoms of DJD, and received
15 physical therapy to treat that condition. Mr. Conroy’s misrepresentation that he had
16 never been diagnosed with or treated for DJD was intentional, and HCC Life is
17 entitled to rescind the policy as a matter of law.

18 **4. Mr. Conroy Testified that he Received at Least Two of Dr.**
19 **Murphy’s Reports**

20 Mr. Conroy testified that he received at least two of Dr. Murphy’s reports, all
21 of which contained Mr. Conroy’s DJD diagnosis. This admission demonstrates Mr.
22 Conroy’s knowledge of and intentional misrepresentation concerning that diagnosis,
23 entitling HCC Life to rescind the policy as a matter of law.

24 Mr. Conroy testified that he received two of the three reports Dr. Murphy
25 completed in connection with his workers’ compensation case. (Rolstad Decl., ¶ 11,
26 Ex. F at 57:12–21.) In all three workers’ compensation reports, Dr. Murphy noted
27 Mr. Conroy’s DJD diagnosis. (Declaration of Jon Padgett in Support of Motion for
28 Summary Judgment, Docket No. 30-6, Ex. G.) Mr. Conroy’s admission

1 demonstrates that he intentionally misrepresented his health in response to specific
 2 questions asked by HCC Life in its insurance application. HCC Life is entitled to
 3 rescind the policy as a matter of law.

4 **5. Dr. Lewis Testified that Mr. Conroy was Diagnosed and**
 5 **Treated for Degenerative Disc Disease and Herniation, and**
 6 **Knew his Diagnosis**

7 Dr. Moshe Lewis testified that Mr. Conroy was diagnosed with and received
 8 treatment for DJD, and that Mr. Conroy would have known of this diagnosis and
 9 treatment.

10 At his deposition on March 14, 2017, Dr. Lewis testified that Mr. Conroy's
 11 medical records clearly delineated a history of DJD. (Rolstad Decl., ¶ 16, Ex. K at
 12 39:6–10.) Dr. Lewis also testified that Mr. Conroy had signs and symptoms of DJD,
 13 including neck pain and pain and weakness in his arm. (Rolstad Decl., ¶ 16, Ex. K
 14 at 55:10–56:4, 69:13–70:5.) Dr. Lewis also testified that Mr. Conroy received
 15 physical therapy, and that physical therapy is commonly used to treat DJD. (Rolstad
 16 Decl., ¶ 16, Ex. K at 58:15–59:6; 59:19–60:2; 70:13–22.)

17 Dr. Lewis testified that, “based on the amount of time that Mr. Conroy had
 18 had neck pain, the persistence of other related complaints to the neck, that
 19 [defendants] should have disclosed that issues as relates to the neck had been
 20 diagnosed and treated.” (Rolstad Decl., ¶ 16, Ex. K at 78:15–21.) Dr. Lewis
 21 testified that Mr. Conroy's “extensive history” of complaints regarding the neck and
 22 the extent of workup and treatment, provided a “significant basis for an awareness”
 23 of Mr. Conroy's DJD. (Rolstad Decl., ¶ 16, Ex. K at 79:15–80:10.) Dr. Lewis
 24 testified that he believed Mr. Conroy knew of his diagnosis because it would have
 25 been malpractice for his doctors to fail to provide him with that diagnosis as it
 26 related to his complaints. (Rolstad Decl., ¶ 16, Ex. K at 83:8–24.) Dr. Lewis
 27 testified that defendants should have disclosed Mr. Conroy's diagnosis of and
 28 treatment for DJD by answering question no. 3 in their application for insurance

1 with HCC Life in the affirmative. (Rolstad Decl., ¶ 16, Ex. K at 85:6–13.) Dr.
 2 Lewis testified that given that Mr. Conroy’s diagnosis and treatment for DJD went
 3 on for multiple years and involved multiple doctor visits, it was unreasonable to
 4 expect that Mr. Conroy was not aware of his DJD diagnosis when he applied for
 5 insurance with HCC Life. (Rolstad Decl., ¶ 16, Ex. K at 94:2–18; 98:4–15; 99:17–
 6 21.)

7 **6. Dr. Zucker’s Testimony**

8 HCC Life’s expert, Dr. Zucker, testified that after reviewing Mr. Conroy’s
 9 medical records, he concluded that

10 The claim on the application that [Mr. Conroy] had never been told of
 11 degenerative disk [sic] disease was not accurate because there were
 12 multiple entries in various records that show that he had been
 diagnosed, that he was aware of the diagnosis, had received treatment
 for the diagnosis.

13 (Rolstad Decl., ¶ 10, Ex. E at 29:23–30:3.)

14 **III. Argument**

15 HCC Life’s motion for reconsideration should be granted because newly-
 16 discovered evidence that demonstrates Mr. Conroy knew he had been diagnosed
 17 with and treated for alcohol abuse and DJD. HCC Life exercised due diligence to
 18 discover the evidence, the evidence is material, and had the Court been aware of the
 19 evidence it would have granted HCC Life’s motion for summary judgment.

20 In addition, Mr. Conroy’s declaration in opposition to HCC Life’s MSJ is
 21 insufficient to create a triable issue of material fact. HCC Life is not required to
 22 show that Mr. Conroy was informed he had been diagnosed with alcohol abuse or
 23 DJD. Evidence is sufficient to show that the insured knew about his ailment when
 24 the ailment had been diagnosed more than once and existed over a multi-year
 25 period.

26 Finally, Mr. Conroy’s declaration is insufficient to create a triable issue of
 27 fact because it is internally inconsistent, inconsistent with Mr. Conroy’s deposition
 28 testimony, and not only uncorroborated by contradicted by the evidence newly

1 obtained in this case.

2 **A. Newly-Discovered Evidence Demonstrates Reconsideration is**
 3 **Appropriate in this Case**

4 A motion for reconsideration may be brought under Fed. R. Civ. Proc.
 5 60(b)(1) on the basis of newly-discovered evidence. “A party is entitled to relief
 6 under Rule 60(b)(2) from an order of summary judgment where (1) the evidence
 7 was discovered after the summary judgment hearing; (2) the moving party exercised
 8 due diligence to discover the evidence; (3) the evidence is material and not merely
 9 cumulative or impeaching; and (4) a new hearing considering the evidence would
 10 probably produce a different result.” *Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525,
 11 1535 (8th Cir. 1996). A motion under Rule 60(b) must be made within a reasonable
 12 time, and no more than a year after the entry of the order. Fed. R. Civ. P. 60(c)(1).
 13 HCC Life’s motion is timely because it is brought 16 days after the Court entered an
 14 order denying HCC Life’s motion for summary judgment.

15 HCC Life’s motion for reconsideration should be granted because evidence
 16 was developed through discovery after briefing on the summary judgment was
 17 complete and therefore was not before the Court. HCC Life had no opportunity to
 18 provide the Court with the newly-considered evidence before the Court issued its
 19 ruling in part because there was no hearing on the motion. Defendants produced the
 20 evidence on March 6, 2017, and HCC Life took depositions that addressed that
 21 evidence between March 7, 2017 and March 15, 2017. (Rolstad Decl. at ¶¶ 3–4.)
 22 The Court issued an order denying HCC Life’s August 26, 2016 motion for
 23 summary judgment on March 22, 2017, only sixteen days after HCC Life discovered
 24 the new evidence, and only 7 days after the last deposition concerning that evidence.
 25 (Docket No. 65.)

26 HCC Life was also diligent in seeking the newly-discovered evidence. HCC
 27 Life propounded requests for interrogatories, requests for production, and requests
 28 for admission on about August 10, 2016. Defendants responded on October 14,

1 2016 and produced almost 750 pages of documents in response. HCC Life also
2 issued subpoenas to eleven medical providers in order to obtain additional
3 documents. (Rolstad Decl. at ¶ 2.) Despite these efforts, on March 6, 2017,
4 defendants produced 572 pages of documents, many of which HCC Life had never
5 seen before, as responsive to the requests for production. (Rolstad Decl. at ¶ 3.)
6 These late-produced documents, and the deposition transcripts which became newly
7 available, support the motion for summary judgment.

8 HCC Life's newly-discovered evidence is material and supports that a new
9 hearing considering the new evidence would produce a different result. First, Mr.
10 Conroy's letter to his doctors at Sharp instructing them to redact all records
11 mentioning alcohol if his employer were to seek those records demonstrates Mr.
12 Conroy's knowledge of and effort to conceal his alcohol abuse. Medical records
13 demonstrate that Mr. Conroy had been diagnosed with and treated for alcohol abuse
14 as early as 1992. These medical records also show that Mr. Conroy experienced
15 serious complications from his alcohol abuse, including alcohol-related
16 hyperlipidemia, ecchymosis, and impaired liver function. Second, a letter from Mr.
17 Conroy's employer demonstrates that Mr. Conroy received and discussed Dr.
18 Murphy's QME report with his employer, and his long history of treatment for DJD
19 shows his knowledge that he had this condition. These records are material to the
20 question whether Mr. Conroy's long history of alcohol abuse and DJD demonstrates
21 that he made intentional misrepresentations of material fact on his application for
22 insurance, and had HCC Life had an opportunity to present this evidence earlier, the
23 Court would have issued a ruling in HCC Life's favor.

24 **B. Newly-Discovered Evidence Shows Mr. Conroy Knew He Had**
25 **Been Treated For and Diagnosed With Alcohol Abuse**

26 Mr. Conroy's declaration that he did not "recall any discussions with any
27 medical providers wherein I was informed that I had been diagnosed with alcohol
28 abuse" and was never referred to "alcohol abuse treatment or counseling," does not

1 create a triable issue of fact as to whether Mr. Conroy misrepresented his health
 2 history in response to HCC Life's questions about that history. Newly-discovered
 3 evidence, including Mr. Conroy's own deposition testimony, demonstrates Mr.
 4 Conroy's alcohol abuse was diagnosed more than once and existed over a multi-year
 5 period, and for that reason summary judgment in HCC Life's favor should be
 6 granted. In addition, the declaration does not create a triable issue of fact because it
 7 is inconsistent with Mr. Conroy's testimony. The declaration is also insufficient to
 8 create a triable issue of fact because it is not only uncorroborated but contrary to all
 9 of the available evidence: Dr. Green testified that he repeatedly counseled Mr.
 10 Conroy concerning his alcohol abuse and treated him by telling him to cut back.
 11 Newly-produced medical records support Dr. Green's testimony and flatly
 12 contradict Mr. Conroy's declaration.

13 **1. HCC Life Does not Need to Prove Mr. Conroy was Informed**
 14 **he was Diagnosed with "Alcohol Abuse"**

15 An insurer may rescind a policy when the insured has misrepresented or
 16 concealed material information in connection with obtaining insurance. *Salkin v.*
 17 *USAA Life Ins. Co.*, 544 F. App'x 713, 714 (9th Cir. 2013); *Nieto v. Blue Shield of*
 18 *California Life & Health Ins. Co.*, 181 Cal. App. 4th 60, 75 (2010). The Insurance
 19 Code imposes "heavy burdens of disclosure" on the parties to an insurance contract,
 20 and misrepresentation or concealment of a material fact permits a party to the
 21 contract to rescind. *Salkin, supra*, 544 Fed. App'x at 714; *Nieto, supra*, 181 Cal.
 22 App. 4th at 76.

23 The law does not require HCC Life to demonstrate that Mr. Conroy was
 24 "informed... [he] had been diagnosed with alcohol abuse." (Docket No. 45-3,
 25 Conroy Decl., at ¶ 12; Order at pp. 11–12.) "Evidence supports the conclusion that
 26 [an insured] knew about his ailment... [when the] ailments appear to have been
 27 diagnosed more than once and to have existed over a multi-year period." *Tran v.*
 28 *Kansas City Life Ins. Co.*, No. 2:15-cv-09963-ODW (RAOx), 2017 WL 58826, at

1 *5, 2017 U.S. Dist. LEXIS 1697, (C.D. Cal. Jan. 5, 2017), judgment entered, 2017
 2 WL 380901, 2017 U.S. Dist. LEXIS 15800 (C.D. Cal. Jan. 25, 2017) (insurer
 3 entitled to summary judgment on rescission defense when the evidence showed the
 4 insured had a long history of diabetes), citing *Philp v. Jackson Nat. Life Ins. Co.*,
 5 107 F.3d 878 (9th Cir. 1997) (unpublished) (insured’s “long medical history that
 6 was contrary to the answers he gave on the application” were grounds for rescission
 7 even if insured “did not appreciate the significance of his medical conditions”).

8 Newly-discovered medical records and testimony demonstrate that Mr.
 9 Conroy received counseling and treatment for alcohol abuse on numerous occasions
 10 for the last 20 years before he experienced delirium tremens at the hospital. Dr.
 11 Green testified that he repeatedly told Mr. Conroy to cut down on his drinking, and
 12 telling a patient to cut down is a form of treatment. Mr. Conroy admits that he was
 13 told to cut back. (Docket No. 45-3, Conroy Decl., at ¶ 12.) Dr. Green had at least
 14 one long talk with Mr. Conroy about his alcohol use because of the effect it was
 15 having on his health. Mr. Conroy suffered from alcohol-related hyperlipidemia,
 16 ecchymosis, and impaired liver function, and was counseled about this by his
 17 doctor. Mr. Conroy instructed his medical providers to conceal his alcohol abuse
 18 from third parties who sought his medical records. Mr. Conroy’s failure to disclose
 19 his long and significant medical history of alcohol abuse are grounds for rescission
 20 even if he did not recall being told he had been diagnosed with alcohol abuse. Mr.
 21 Conroy’s failure to disclose his lengthy history of severe alcohol abuse, and his
 22 efforts to conceal that history, entitles HCC Life to rescind the policy as a matter of
 23 law.

24 In his declaration, Mr. Conroy said that he “did not recall any discussions
 25 with his medical providers wherein [he] was informed that [he] had been diagnosed
 26 with alcohol abuse.” (Docket No. 45-3, Conroy Decl., at ¶ 12.) Even if Mr.
 27 Conroy’s medical providers did not use the term “alcohol abuse,” Mr. Conroy
 28 understood that he had been told for more than 20 years that his drinking was so

1 excessive that he was showing physical signs of alcohol abuse. Dr. Green testified
 2 and newly-produced medical records show that Dr. Green discussed Mr. Conroy's
 3 excessive alcohol use during multiple long talks. Mr. Conroy admitted that he
 4 attempted to reduce his drinking in response to Dr. Green's instructions. (Rolstad
 5 Decl., ¶¶ 9, 11, Exs. D, F.)

6 **2. Mr. Conroy's Declaration is Insufficient to Create a Triable**
 7 **Issue of Fact Because it is Internally Inconsistent and Lacks**
 8 **Supporting Evidence**

9 A party's conclusory and self-serving declarations, "lacking detailed facts and
 10 any supporting evidence" are insufficient to create a genuine issue of material fact.
 11 *Nigro v. Sears, Roebuck & Co.*, 784 F.3d 495, 497–498 (9th Cir. Cal. 2015), quoting
 12 *F.T.C. v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir.1997). In
 13 *Nigro*, the court found a declaration to be sufficient to create an issue of material
 14 fact because it was internally consistent. By contrast, based on Dr. Green's
 15 testimony that being told to cut back is treatment for alcohol abuse, Mr. Conroy's
 16 declaration is internally inconsistent. In addition, his declaration is not is not only
 17 uncorroborated but directly contradicted by his medical records and the testimony of
 18 his primary care physician, Dr. Green.

19 **(a) Mr. Conroy's Declaration is Internally Inconsistent**

20 The court's holding in *Nigro, supra*, is distinguishable from the present case.
 21 In *Nigro*, the court held that the plaintiff's declaration and deposition testimony
 22 were sufficient to create a genuine dispute of material fact because his testimony
 23 was "based on personal knowledge, legally relevant, and internally consistent."
 24 *Nigro, supra*, 784 F.3d at 498.

25 Unlike the declaration in *Nigro*, Mr. Conroy's declaration is insufficient to
 26 create a triable issue of material fact because it is internally inconsistent. Mr.
 27 Conroy contends that he was not treated for alcohol abuse, but he admits that he was
 28 told to cut back. (Docket No. 45-3, Conroy Decl., at ¶ 12.) Dr. Green testified that

1 being told to cut back is a form of treatment. (Rolstad Decl., ¶ 9, Ex. D at 10:18–
2 21.)

3 Mr. Conroy’s declaration is also inconsistent with his own deposition
4 testimony. His declaration says that he was not told he had been diagnosed with
5 alcohol abuse, but at his deposition he admitted that his alcohol consumption was a
6 topic of discussion with Dr. Green during all of his appointments for more than ten
7 years. It is not necessary that a medical provider use the term “alcohol abuse” for
8 Mr. Conroy to have known that he suffered from this condition. See *Tran, supra*,
9 2017 WL 58826, at *5, 2017 U.S. Dist. LEXIS 1697.

10 **(b) Mr. Conroy’s Declaration Lacks Corroborating**
11 **Evidence**

12 Like the declaration in *Publishing Clearing House*, Mr. Conroy’s declaration
13 is insufficient to create a genuine issue of material fact because it lacks any
14 supporting evidence. *Publishing, supra*, 104 F.3d at 1171. Although declarations
15 need not always be supported by corroborating evidence, Mr. Conroy’s declaration
16 is insufficient in this case because all of the corroborating evidence Mr. Conroy
17 could have obtained flatly contradicts his declaration.

18 Mr. Conroy’s declaration is distinguishable from the declarations at issue in
19 *SEC v. Phan*, 500 F.3d 895 (9th Cir. 2007). In *Phan*, the court held that the
20 defendants’ two declarations concerning their conversation with each other did not
21 need corroborating evidence because in “most conversations between two people,”
22 there is unlikely to be corroborating evidence. *Id.* at 910. Here, there was evidence
23 concerning Mr. Conroy’s conversations with Dr. Green – including medical records
24 and Dr. Green’s own declaration – but defendants did not provide that evidence
25 because it does not corroborate Mr. Conroy’s declaration, instead the evidence
26 directly contradicts it. For example, in his declaration Mr. Conroy states that he was
27 never referred “to any alcohol abuse treatment or counseling.” (Docket No. 45-3,
28 Conroy Decl., at ¶ 12.) This declaration is not only without corroborating evidence

1 but is contradicted by Dr. Green's testimony and medical records that show Dr.
 2 Green referred Mr. Conroy to a dietician who instructed Mr. Conroy to decrease his
 3 alcohol consumption. (Rolstad Decl., ¶ 9, Ex. D at 23:24–25:8; ¶ 8, Ex. C at
 4 CONROY 001011.)

5 **C. Newly-Discovered Evidence Shows Mr. Conroy Knew He Had**
 6 **Been Treated for and Diagnosed With DJD**

7 HCC Life's newly-discovered evidence, including a letter from Mr. Conroy
 8 from his employer that says the employer discussed Dr. Murphy's findings with Mr.
 9 Conroy, demonstrates that Mr. Conroy also knew he had been diagnosed with and
 10 treated for DJD. Mr. Conroy cannot both seek workers' compensation benefits for
 11 his degenerative disc disease and also claim that he was not aware that he suffered
 12 from the condition. Mr. Conroy's long history of DJD, his multiple office visits,
 13 and his long history of treatment for that condition demonstrate Mr. Conroy's
 14 knowledge of his condition. See *Tran, supra*, 2017 WL 58826, at *5, 2017 U.S.
 15 Dist. LEXIS 1697. His declaration to the contrary is again uncorroborated and
 16 contrary to the documents defendants belatedly produced, and for that reason is
 17 insufficient to create a triable issue of fact. See *Publishing, supra*, 104 F.3d at 1171.

18 **D. There is No Evidence to Support Defendants' Bad Faith Claim**

19 To prove a breach of the implied covenant defendants must show that HCC
 20 Life's decision to rescind the policy was unreasonable or without proper cause.
 21 *Brandwein v. Butler*, 218 Cal. App. 4th 1485, 1514–15 (2013). Bad faith implies
 22 unfair dealing rather than mistaken judgment. "The ultimate test is whether the
 23 insurer's conduct was unreasonable." *Nieto v. Blue Shield of California Life &*
 24 *Health Ins. Co.*, 181 Cal. App. 4th 60, 86 (2010). "If the conduct of the insurer in
 25 denying coverage was objectively reasonable, its subjective intent is irrelevant."
 26 *Bosetti v. U.S. Life Ins. Co. in City of N.Y.*, 175 Cal. App. 4th 1208, 1236 (2009).
 27 "There is no cause of action for breach of the covenant of good faith and fair dealing
 28 when no benefits are due." *Brandwein, supra*, 218 Cal. App. 4th at 1514–15.

1 In deciding whether there was a genuine dispute as to coverage, “the court
2 does not decide which party is ‘right’ as to the disputed matter, but only that a
3 reasonable and legitimate dispute actually existed.” *Keshish v. Allstate Ins. Co.*, 959
4 F. Supp. 2d 1226, 1234 (C.D. Cal. 2013).

5 HCC Life’s decision to rescind the policy was reasonable as a matter of law.
6 Mr. Conroy’s long medical history of severe alcohol abuse and DJD set forth in
7 HCC Life’s motion for summary judgment demonstrates that rescission was
8 appropriate. As explained by HCC Life’s expert, Dr. Zucker, the entire process was
9 “in good faith on the part of the insurance company in that the process was made
10 completely transparent and aware to Mr. and Mrs. Conroy. Opportunities for
11 contesting the opinion where [sic] available.” (Rolstad Decl., ¶ 10, Ex. E at 30:5–
12 11.)

13 **IV. Conclusion**

14 HCC Life requests its motion for reconsideration be granted, and that the
15 Court grant HCC Life’s motion for summary judgment.

16
17 DATED: April 7, 2017

SEDGWICK LLP

18
19
20 By: /s/ Dennis G. Rolstad

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